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IN THE
SUPREME COURT OF THE UNITED STATES

No.....

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Respondent,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Petitioner,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, The Supreme Court of the United States:

The petition of United States Fidelity and Guaranty Company, a corporation, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner is a corporation of the State of Mary-

land and duly authorized to write surety bonds and liability insurance in the State of Montana.

On September 20, 1934, Coverdale & Johnson, a copartnership, made a contract with the State of Montana providing for the construction of certain highway bridges on the Sun River Highway in Lewis and Clark County, Montana. The contract required Coverdale & Johnson to furnish a performance bond and also to furnish public liability insurance.

> "The Contractor shall carry public liability insurance to indemnity the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance." (R 86).

The United States Fidelity and Guaranty Company wrote both the performance bond and the public liability insurance policy. The public liability policy contained the following exclusions:

> "This policy shall not cover loss from liability for, or any suit based on injuries or death:
>
> "Caused directly or indirectly by any draught animal, any automobile . . . . (including the loading or unloading thereof) elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations." (R 133-135-155).

The United States Fidelity and Guaranty Company advised the Montana Highway Commission by letter that the public liability insurance had been written. The letter was as follows:

"Oct. 1, 1934

"Attention: Mr. Whipps
Montana State Highway Commission
Helena, Montana
Dear Sir:

"Re: Coverdale & Johnson—NRH-275 "A"
Unit 2—$5,270.32
Coverdale & Johnson—NRH-176 "E"
Unit 2—$15,115.66

"I have executed and herewith enclose bonds covering the above captioned contracts.

"For your information, wish to advise that we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934. (R 113).

Yours very truly,
DON W. JACOBUS
Manager
By (s) L. K. ALBRECHT
Assistant Manager."

On December 12, 1934, Roberta Doheny and Marguerite Doheny were killed in an automobile accident while riding in the automobile of the partner Johnson, the accident having occurred at a point on the highway twelve miles from the point at which Coverdale & Johnson were building the bridges.

Thereafter, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny and Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, sued Coverdale & Johnson in the District Court in Cascade County, Montana, in negligence actions and recovered judgments in both cases. On May 20, 1937, the judgments were affirmed by the Montana Supreme Court.

Thereafter, on refusal of the United States Fidelity and Guaranty Company to pay the judgments after demand, the Administratrix filed suits directly against United States Fidelity and Guaranty Company in Cascade County, Montana, praying for judgment in the amount recovered in the actions against Coverdale & Johnson. The latter cases were removed to the United States District Court on diversity of citizenship, and there consolidated and tried on December 26, 1939. The actions were tried without a jury and on September 13, 1940, the United States District Judge gave judgment for the plaintiff in both cases.

An appeal was taken by the defendant United States Fidelity and Guaranty Company to the United States Circuit Court of Appeals for the Ninth Circuit and on November 17, 1941, the judgment of the United States District Court was affirmed in a majority opinion concurred in by two of the Circuit Judges and in a minority opinion in which Circuit Judge Haney concurred specially.

The majority opinion by Circuit Judges Healy and Bowen, affirming the United States District Court, holds that the United States Fidelity and Guaranty Company, having furnished both the completion bond and the public liability policy, is not permitted to rely upon the exclusion provisions contained in the public liability policy, notwithstanding that the exclusions might otherwise be valid.

In the concurring opinion Circuit Judge Haney said:

"Third. I do not believe this case is a proper one

for the invocation of an equitable estoppel. My understanding of such an estoppel is the case where one, by his conduct has mislead another who relies on the fact indicated by such conduct, to his disadvantage. See 21 C. J. 1113, sec, 116. While an estoppel might arise here as against the state, appellee has relied on no conduct of appellant, and consequently has neither taken nor changed her position as a result of any action or conduct of appellant.

"I think the judgment should be affirmed but on the ground that recovery is had under the bond."

Estoppel was never pleaded or relied upon.

Estoppel was injected into the case for the first time in the decision of the Circuit Court of Appeals and appellant was never given any opportunity to meet it.

Motion for re-hearing was filed but was denied by the Circuit Court of Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has herein decided an important question of Federal law which has not been, but should be, settled by this Court, in that the Circuit Court of Appeals has based its affirmance of a decision of a United States District Court on an estoppel which was not pleaded or relied on below and which was not available to appellee or against appellant under the provisions of Rule 8(c), Rules of Civil Procedure for the District Courts of the United States, Act of June 19, 1934, Chapter 651.

Rule 8(c) of the Rules of Civil Procedure for the District Courts of the United States provides:

"AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirm-

atively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense."

Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States provides:

"WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, ..."

2. The Circuit Court of Appeals has herein decided an important question of local law in a way probably in conflict with applicable local decisions in that the Circuit Court of Appeals has based its affirmance of a decision of the United States District Court on an estoppel which was not pleaded or relied on below and which was not available to appellee or against appellant under the decisions of the Supreme Court of Montana, thereby depriving appellant of the right to be heard on the question.

3. The Circuit Court of Appeals has so far departed from the accepted course of judicial proceedings as to call for the exercise of the power of supervision by the Supreme Court of the United States in that the Circuit Court of Appeals, in a decision of great public importance, as will be pointed out in the brief has injected into its decision an equitable estoppel which was neither pleaded nor relied upon below and which was not available to appellee or against appellant under Rule 8(c) Rules of Civil Procedure for the District Courts of the United States or under the decisions of the Supreme Court of Montana; thereby introducing into the general law a rule heretofore unsanctioned by any of the courts

of the United States or the State of Montana, or any of the other states, so far as can be determined, and the effect of which is:

(a) Where any contracting public board, body, or commission requires, in general terms, as in the highway contract in this case, that:

> "The Contractor shall carry public liability insurance to indemnify the public for injuries or damage sustained by reason of carrying on the work. This insurance shall be in the amount of at least $10,000.00 for one person and a total of $20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance,"

the insurance company is estopped or prevented from writing any public liability insurance in any form, or containing any conditions, limitations or exclusions less broad than the language in the highway contract just quoted.

(b) By the decision of the Circuit Court of Appeals the estoppel becomes available to the members of the public (a class to which the plaintiffs in these actions belong) notwithstanding the fact that no representation was made to them upon which they could have relied to their detriment.

(c) By estoppel the contract (in this case the highway contract) becomes the insurance in place of the public liability policy.

(d) What was intended to be a policy of indemnity against legal liability only, becomes, by estoppel, a policy of absolute indemnity against injury or damage to the public by reason of carrying on the work.

(e) Under the circumstances in this case, which circumstances are no doubt in general application throughout the United States, contractors' public liability insurance is annulled, by estoppel or otherwise, and replaced by the general terms of the construction contract specifications which in themselves are not susceptible of being construed as a contract. As a consequence, unless all contracting public agencies shall modify their specifications to indicate the form and terms and conditions in contractors' public liability insurance there is no form or method by which such insurance can be written.

QUESTIONS PRESENTED

1. In an action by a member of the public as a third party claimant against a casualty company on a contractor's public liability policy was the Circuit Court of Appeals in error in holding, for the first time on appeal, that the Casualty company was estopped from relying on the exclusions in the policy when the question of estoppel had not been pleaded or raised below, or relied on by the plaintiff under the provisions of Rule 8(c) Rules of Civil Procedure for the District Courts of the United States; Act of June 19, 1934, Chapter 651.

2. In an action by a member of the public as a third party claimant against a casualty company on a contractor's public liability policy was the Circuit Court in error in holding for the first time on appeal, that the casualty company was estopped from relying on the exclusions in the policy when the question of estoppel had not been pleaded or raised below, or relied on by the

plaintiff as required by the decision of the Supreme Court of the State of Montana.

3. When a casualty company furnishes a performance bond to the Highway Commission of the State of Montana, on a contract for the construction of highway bridges and when the highway contract contains a standard specification as follows:

> "The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work,"

and when the casualty company furnishes a public liability policy containing an exclusion as follows:

> "This policy shall not cover loss from liability for, or any suit based on injuries or death;
>
> "Caused directly or indirectly by any . . . . automobile . . . . or other vehicle (including the loading and unloading thereof) elsewhere than at the immediate places covered by the policy where the assured is carrying on his operations,"

and where the casualty company notified the Highway Commission as follows:

> "For your information, wish to advise that we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits of Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934,"

(a) Can a member of the public who was injured in an automobile accident at a point twelve miles from the site of the contract work and who recovers judgments in the state court in Montana against the contractor and who then sues the casualty company on the public liability policy in a third party action in the United States Courts

avail himself on appeal of an estoppel which was not pleaded or relied upon in trial court?

(b) In the absence of pleading and proof of, or reliance on, estoppel below, is the Circuit Court of Appeals in error under Rules 8(c) and 12(h) Rules of Civil Procedure for the District Courts of the United States in holding that the casualty company is estopped from relying upon the exclusion provision in the public liability policy?

(c) In the absence of pleading and proof of, or reliance on, estoppel below, is the Circuit Court of Appeals in error in the light of the decisions of the Supreme Court of Montana in holding that the casualty company is estopped from relying upon the exclusion provision in the public liability policy?

(d) In the light of the facts and pleadings in this case the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the powers of supervision of the Supreme Court because:

(1) The Circuit Court of Appeals rested its decision on an estoppel which was neither pleaded nor relied upon in the lower court.

(2) By this decision the Circuit Court of Appeals has sanctioned the substitution of a general clause in the specifications in a construction contract in place of the particular provisions in the contractor's public liability policy; thereby transforming a contract of indemnity against legal liability, only, to a contract of absolute indemnity for the whole public,

the effect of which is to establish a legal precedent not heretofore sanctioned by any courts and of such significance as to substantially prevent contracting public boards or commissions from requiring contractors to furnish contractor's public liability insurance in any form.

JURISDICTION

I.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was rendered on November 17, 1941, and is officially reported in 123 Fed. (2) 746. The findings, conclusions and judgment of the trial court have not been officially reported.

II.

The jurisdiction of the trial court was not challenged and is based on diversity of citizenship with the requisite jurisdictional amount, U. S. C. A. Vol. 28, sec. 41(1); Judicial Code, Section 24 as amended.

The jurisdiction of the United States Supreme Court is invoked under the provisions of Section 240 of the Judicial Code as amended, U. S. C. A. Vol. 28, section 347.

The reasons for invoking the jurisdiction of the Supreme Court are:

1. Sections 8(c) and 12(h) of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Chapter 651, are here involved.

2. As will be shown in the brief hereafter, the Circuit Court of Appeals for the Ninth Circuit has handed down

a decision, unsupported by legal precedent, and of such wide importance that it is in the public interest to have the question decided by the court of last resort.

(3) As will be shown in the brief on jurisdiction hereafter, the Circuit Court of Appeals for the Ninth Circuit in an important case has handed down an opinion which is contrary to the decisions of the Supreme Court of the State of Montana.

WHEREFORE, Petitioner respectfully prays that upon further consideration of this case this court may be pleased to reverse and remand the same to the Circuit Court of Appeals for the Ninth Circuit.

John E. Patterson

Attorney for Petitioner.

Howard Toole

W. T. Boone

Of Counsel for Petitioner.